

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 24, 2007 Session

STATE OF TENNESSEE v. JOSEPH WAYNE HIGGINS
Appeal from the Criminal Court for Knox County
No. 72976 Mary Beth Leibowitz, Judge

No. E2006-01552-CCA-R3-CD - Filed September 27, 2007

The defendant, Joseph Wayne Higgins, was convicted by a Knox County jury of three counts of rape of a child, a Class A felony, and received an effective sentence of forty-five years in the Tennessee Department of Correction. The defendant appeals his convictions, arguing that the trial court (1) committed plain error by improperly admitting testimony relating to acts committed by the defendant that were unrelated to the elected offenses, (2) committed plain error by improperly admitting testimony of three witnesses who bolstered the victim's credibility after it had been impeached, (3) improperly instructed the jury as to "recklessness", (4) improperly imposed an excessive sentence, and (5) improperly sentenced the defendant to consecutive terms. After reviewing the record, we conclude that the trial court improperly admitted testimony regarding specific acts of conduct by the defendant and failed to instruct the jury regarding prior consistent statements. However, because we conclude that these errors did not rise to the level of plain error, we deny the defendant relief on these issues. We also conclude that the trial court properly instructed the jury regarding recklessness and properly imposed consecutive sentences. However, we conclude that the trial court improperly applied sentence enhancement factors to one of the defendant's convictions. Therefore, we affirm the judgments of the trial court but reduce the defendant's total effective sentence from forty-five years to forty years.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court
Affirmed as Modified

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J.C. MCLIN, JJ., joined.

Richard L. Gaines, Knoxville, Tennessee (on appeal); Mark E. Stephens, District Public Defender; John Halstead, Assistant District Public Defender (at trial), for the appellant, Joseph Wayne Higgins.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Randall E. Nichols, District Attorney General; Leslie Nassios, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At trial the victim, V.H.,¹ testified that she was born on September 4, 1989. She recalled that when she was about five years old, she was in kindergarten at South Knox Elementary School and lived with her parents and two siblings in a house on Davenport Road in Knoxville. The victim testified that twice during this time, the defendant, her father, raped her in the family home. On one occasion, the defendant anally raped her in a spare bedroom. On another occasion, the defendant vaginally raped her in her parents' bedroom. On the second occasion, the victim said that she had diarrhea but the defendant did not let her go the restroom, and as a result, she "messed up the sheets." The victim testified that the defendant cleaned the bedroom before her mother, who was not in the house while these events took place, returned home.

The victim testified that her parents eventually separated, and after living with her mother and siblings for a while, she moved in with Bobbie and Butch Cinnamon, the defendant's aunt and uncle. The victim stated that she was nine or ten years old while she lived with the Cinnamons. The victim did not know the precise location of their residence, but she did recall that the house was located in Knoxville. The victim testified that on several occasions while she lived with her relatives, the defendant's grandmother, Dorothy Cinnamon, would take her (the victim) to Ms. Cinnamon's residence on Worth Street in Knoxville. According to the victim, the defendant would usually be present at the Worth Street residence when his grandmother brought the victim there. The victim stated that the defendant attempted to rape her on more than one occasion in a bathroom at the Worth Street residence. The victim stated that on these occasions, the defendant would place the victim on a washer or dryer inside the bathroom. The victim said that the defendant did not actually succeed in penetrating her vagina, but she did state that the defendant did touch her vagina with his penis. The victim stated that on another occasion, the defendant raped her in "Matthew's room"² at the Worth Street residence, placing his penis inside the victim's vagina.

The victim also testified that while she lived with her relatives, the defendant maintained a residence on Churchwell Avenue in Knoxville. On one occasion shortly before she left her relatives' care, she was visiting her father at the Churchwell Avenue residence when the defendant asked her to help him make the bed in his bedroom. The victim testified that while she was making the bed, the defendant placed her on the bed and raped her, placing his penis in her vagina.

The victim also testified to three other incidents that occurred while she was in her relatives' custody. On one occasion, the victim was at the Worth Street residence when the defendant "took" her to a storage shed behind the house. According to the victim, "nothing happen[ed]" because

¹This court does not disclose the names of rape victims in its opinions.

²It is unclear from the record as to who Matthew was, as none of the persons who testified at trial identified this person's relationship to the victim or the defendant.

Dorothy Cinnamon “hollered for him. Like . . . he had a telephone call or something.” On another occasion, the victim and the defendant were in a room at a Family Inn when the defendant sprayed a substance on a cloth and attempted to place the cloth over the victim’s mouth. The victim testified that she screamed, and after that the defendant did not touch her in any way. The victim testified that on several occasions, the defendant would put a pillow over her face, tie her to the bed, or bind her hands with duct tape. However, the victim did not testify that she was bound, restrained, or drugged during any of the rapes; in fact, when asked if the defendant attempted to bind or restrain the victim during any of the episodes at the Worth Street residence—including both the episodes in the bathroom and the rape in Matthew’s bathroom—the victim replied “no.” However, the defendant’s trial counsel did not object to any testimony concerning these three episodes, even after the victim denied being restrained during the Worth Street incidents. Defense counsel also did not object to the prosecution’s mentioning these events during closing arguments.

On cross-examination, the victim stated that her parents separated when she was five years old and in kindergarten. She stated that eventually, she, her siblings, and her mother moved in with Clyde Hawn, who her mother was dating. The victim stated that she lived with Hawn for eight or nine months before Hawn shot the victim’s younger brother.³ After that incident, the victim moved in with the Cinnamons. The victim recalled that shortly after she moved in with her relatives, she visited a doctor for a stomach ache, at which time the doctor “figur[ed] out” that she had been sexually abused. The victim admitted that she told both a social worker and a physician at East Tennessee Children’s Hospital that Hawn had molested her on several occasions by digitally penetrating her, but the victim did not allege that Hawn had anally penetrated her or had penetrated her with his penis. The victim also admitted that in March 1999, she had written a letter to her mother claiming that she was unhappy living with her relatives and asking her mother to tell the judge what was happening so she could return to her mother’s house. The victim also admitted that in February 2001, after she had been returned to her mother’s custody, she was examined by Dr. Machen at Childhelp, and shortly after that exam, she admitted to a Department of Children’s Services (DCS) caseworker that the reason she had initially alleged that Hawn had molested her was because her father’s family would not believe her and would “just deny it” if she accused her father of raping her. The victim also stated that had she was afraid she would have gotten in trouble had she identified her father as her abuser rather than Hawn.

On redirect, the victim testified that Hawn never touched her or raped her. The victim acknowledged that when she was “a little girl,” she had told her mother that the defendant was “messaging” with her, and that the defendant’s family knew about this accusation. However, the victim stated that the defendant’s family did not believe her at the time of that accusation, and she believed that the defendant’s family would not believe her if she revealed that her father was again raping her.

³It is unclear from the record whether this act was intentional or accidental.

Patty Lawson testified that in February 2001, she was employed as a sexual abuse investigator with DCS. She testified that she investigated allegations that the defendant had sexually abused his daughter, and that she interviewed the victim as part of the investigation. Lawson testified that the victim was adamant that her father, the defendant, had abused her. Lawson testified that before the interview, she became aware that the victim had initially alleged that Hawn had molested her. Lawson asked the victim about these earlier allegations, and according to Lawson, the victim stated that at the time it became evident that she had been sexually abused, she was living with paternal relatives, and she was afraid to identify her father as her abuser because she did not think that the defendant's family would believe her. Lawson also interviewed the defendant's grandmother, Dorothy Cinnamon, as part of the investigation. Ms. Cinnamon told Lawson that the victim had in her opinion falsely accused her father of abusing her when she was four years old. Lawson attempted to locate the DCS file on this investigation, but she was unable to do so. Lawson testified that the absence of a file was not unusual, as records "not indicating abuse" are purged after a certain number of years. Defense counsel did not object to any part of Lawson's testimony.

On cross-examination, Lawson admitted that she had reviewed a May 1994 medical report detailing a physical examination of the victim and that the report contained the annotation "genitalia, normal female." On redirect, Lawson testified that the 1994 physical exam was conducted as part of a behavioral examination of the victim and her brother and "had nothing to do with sex abuse."

Susan Raulston, the victim's mother, testified that before October 1994, she was married to the defendant and that she lived with him and their three children on Davenport Road in Knoxville. In October, she left the defendant, moving out of their residence and taking the children with her. Raulston testified that while she was still married to the defendant, she worked at a KFC restaurant in Knoxville, and while she was at work, the defendant was at home with the children. On one occasion when the victim was four or five years old, she called the defendant's grandmother, Dorothy Cinnamon, and his mother, Sandra Higgins, so they could give her a ride to the grocery store. When the two women arrived to pick Raulston up, the victim began screaming, telling the women, "Don't leave me here; daddy touches me." According to Raulston, the defendant's mother and grandmother heard the defendant's outburst. Raulston notified DCS, but no further investigation resulted from her report.

Raulston testified that after she left her husband in October 1994, she and the children moved around "quite a bit" over the next four years before they moved in with Clyde Hawn in July 1998. In February 1999, Hawn shot Raulston's son, and DCS took custody of the children. DCS placed the victim in the physical custody of Bobbie and Butch Cinnamon, the defendant's aunt and uncle, while retaining legal custody. Shortly after DCS placed the victim with paternal relatives, Raulston received a letter from the victim in which she expressed displeasure over living with the Cinnamons but in which she also wrote, "Mommy, I'm scared to tell what my dad done." Raulston stated that she knew about what her daughter was referring, and that she forwarded the letter to her attorney. Raulston stated that DCS removed the victim from the Cinnamons' custody in July 1999 and moved

her to several foster care placements before returning the children to her physical custody in December 2000.⁴ Shortly after regaining physical custody of her children, Raulston took the victim to DCS and filed a sexual abuse allegation against the defendant. Raulston testified that she believed her daughter's accusations against her father and did not attempt to influence her daughter to fabricate accusations against the defendant. Defense counsel did not object to any part of Raulston's testimony.

On cross-examination, Raulston testified that the physical exam performed in connection with her daughter's psychological testing took place in May 1994, and that the outburst in which the victim first accused her father of abuse did not occur until June 1994. Raulston admitted that despite the initial accusation, she and the children remained with the defendant until October 1994. Raulston admitted that Hawn had been physically abusive toward both her and the children, and that at the time DCS removed the children from her custody, she had told DCS about Hawn's abusive behavior, which included Hawn pointing a gun at the children. Raulston also denied coercing her daughter into writing the letter accusing her relatives of mistreating her and expressing fear over what the defendant was doing to her.

Dr. Charles Machen, a pediatrician licensed to practice medicine in Tennessee, testified that in February 2001, he examined the victim at the Childhelp Children's Center in Knoxville. Dr. Machen testified that Childhelp "advocates for the prevention, investigation[,] and treatment of abuse, particularly sexual abuse. . . . [I]t's implied if a young person is there at the Child[h]elp Center that they're there because of some allegation." Dr. Machen noted that Childhelp examinations "are full examinations. They're head to toe examinations. They're examinations that are very similar to what a young person would get if they go to their regular doctor." Dr. Machen's examination of the victim revealed abnormal notches in the victim's hymen which went completely through the hymen to the vaginal wall. Dr. Machen testified that these findings were consistent with an allegation of sexual penetration. Dr. Machen testified that his examination of the victim's anus revealed no evidence of tears or scarring, but that these findings were not necessarily inconsistent with abuse because the stretching ability of the rectum and anal sphincter "allows penetration of the anus without any physical findings," and that physical injuries to the anus tend to heal rapidly and are therefore detectable only for a short period of time. Dr. Machen testified that the victim identified the defendant as the person who raped her.

On cross-examination, Dr. Machen testified that before he examined the victim, he took a history of the victim from Raulston, the victim's mother. Dr. Machen stated that Raulston informed him about the victim's initial accusation against her father, which occurred when the victim was four years old. Dr. Machen also stated that Raulston informed him that the victim had originally accused Hawn of the more recent episodes of sexual abuse. Dr. Machen said that before testifying he

⁴ According to Raulston, she regained legal custody of her children in March 2001.

reviewed an emergency room report from East Tennessee Children's Hospital⁵ dated April 8, 1999, in which the treating physician noted a tear in the victim's hymen. Dr. Machen read parts of the April 1999 report into the record; in the report, the victim accused Hawn of digitally penetrating the victim's vagina, but she did not accuse Hawn of any other sexual abuse. Dr. Machen stated that although Raulston had mentioned Hawn prior to Dr. Machen's physical examination of the victim, Dr. Machen did not ask the victim any questions concerning Hawn. Dr. Machen admitted that the victim's injuries "could be consistent" with digital penetration.

On redirect, Dr. Machen read into evidence sections of the report he prepared following his examination of the victim. According to the report, the victim told Dr. Machen that her mother was not aware of the sexual abuse that was occurring while she was in her paternal relatives' care. Also, Dr. Machen read from a section of his report in which Raulston discussed the victim's initial accusation of sexual abuse against her father, the one occurring when the victim was four years old. According to the report, while Raulston and her children were living in Florida after leaving the defendant, the victim made an additional accusation that her father had abused her while her parents were still living together. Dr. Machen also read sections of the report that reiterated his earlier testimony that the victim had originally accused Hawn of the more recent episodes of sexual abuse, but that her father had actually committed the offenses while the victim was in the Cinnamons' custody. Defense counsel did not object to any portion of Dr. Machen's testimony.

At the close of the state's proof, the state elected, based on testimony by the victim, three incidents to fit three counts of child rape. The first count incorporated the allegation that the defendant raped the then-five-year-old victim in her parents' bedroom at the family home on Davenport Road in Knoxville. The second and third counts incorporated events that happened while the victim had been placed in the physical custody of her paternal relatives, Bobbie and Butch Cinnamon, between February and July 1999. The second count incorporated the allegation that the defendant vaginally raped the victim in Matthew's bedroom at Dorothy Cinnamon's house on Worth Street in Knoxville. The third count incorporated the allegation that the defendant vaginally raped the victim in the defendant's bedroom at his residence on Churchwell Avenue in Knoxville. The defendant did not testify or present witnesses in his own defense.

Based on the above proof, the jury found the defendant guilty on all counts of the indictment. The trial court sentenced the defendant to twenty-five years in prison on count one of the indictment, the count incorporating the rape committed when the victim was between four and five years of age, and twenty years on each of the other two counts. The trial court ordered counts two and three to be served concurrently to each other and consecutive to count one, resulting in an effective sentence of forty-five years in prison. This appeal follows.

⁵It is unclear from the record whether Dr. Machen reviewed this report prior to examining the victim. This report was not introduced as an exhibit at trial.

ANALYSIS

Plain Error

The defendant's first two contentions on appeal are that the trial court improperly allowed the victim to testify about events that were unrelated to the offenses elected by the state, and that the trial court improperly allowed three witnesses to testify about the victim's allegations that the defendant had raped her and her explanations why she had previously accused Clyde Hawn of the offenses. However, as stated above, the defendant did not make a contemporaneous objection at trial. Typically a party's failure to make a contemporaneous objection to trial testimony will result in a waiver of the issue on appeal. Tenn. R. App. P. 36(a); State v. Thompson, 36 S.W.3d 102, 108 (Tenn. Crim. App. 2000). However, "an error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for new trial or assigned as error on appeal," if the appellate court considers such notice "necessary to do substantial justice." Tenn. R. Crim. P. 52(b).

In conducting a plain error review, a court will reverse for plain error only if:

- (a) The record . . . clearly establish[es] what occurred in the trial court;
- (b) a clear and unequivocal rule of law [has] been breached;
- (c) a substantial right of the accused [has] been adversely affected;
- (d) the accused did not waive the issue for tactical reasons; and
- (e) consideration of the error is "necessary to do substantial justice."

State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). The appellate court need not consider all five factors if any single factor indicates that relief is not warranted. Smith, 24 S.W.3d at 283. Furthermore, for this court to reverse the judgment of a trial court, the "'plain error' must [have been] of such a great magnitude that it probably changed the outcome of the trial," and "recognition should be limited to errors that had an unfair prejudicial impact which undermined the fundamental fairness of the trial." Adkisson, 899 S.W.2d at 642.

Admission of Prior Bad Acts

The defendant claims that the trial court improperly admitted the victim's testimony regarding three episodes of uncharged conduct between the defendant and the victim. Specifically, the defendant objects to the episode in which the defendant attempted to place a chemical-soaked rag

over the victim's mouth, episodes in which the defendant bound or restrained the victim, and the episode in which the defendant led the victim to a shed on Dorothy Cinnamon's property. The defendant claims that these acts should have been excluded as irrelevant and prejudicial "prior bad acts" under Rule 404(b) of the Tennessee Rules of Evidence, while the state claims that the defendant waived the issue by not raising a contemporaneous objection at trial, and absent a waiver, the episodes were properly admitted under the exception announced by the Tennessee Supreme Court in State v. Rickman, 876 S.W.2d 824 (Tenn. 1994). We conclude that these events do not fall under the Rickman exception and should have been excluded as irrelevant and prejudicial. However, we conclude that admission of testimony related to these incidents does not rise to the level of plain error, and therefore we deny the defendant relief on this issue.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. Tenn. R. Evid. 404(b). The rule excluding such irrelevant and prejudicial evidence "is based on the recognition that such evidence easily results in a jury improperly convicting a defendant for his or her bad character or apparent propensity or disposition to commit a crime regardless of the strength of the evidence concerning the offense on trial." Rickman, 876 S.W.2d at 828 (citing Anderson v. State, 165 Tenn. 569, 56 S.W.2d 731 (1933)). The danger of such activity "particularly exists when the conduct or acts are similar to the crimes on trial." Id. (citing State v. Parton, 694 S.W.2d 299, 303 (Tenn. 1985)).

Rule 404(b) is generally one of exclusion, but exceptions to the rule may occur when evidence of the otherwise inadmissible offense is offered to prove the motive of the defendant, identity, intent, the absence of mistake or accident, opportunity, or a common scheme or plan. State v. Tolliver, 117 S.W.3d 216, 230 (Tenn. 2003); State v. McCary, 119 S.W.3d 226, 243 (Tenn. Crim. App. 2003). While the Rickman court explicitly declined to recognize a general "sex crimes" exception to Rule 404(b), the court did create a narrow exception: "in the prosecution of criminal acts committed against young children who are frequently unable to identify a specific date on which a particular offense was committed," evidence of other sex crimes is admissible "when an indictment is not time specific and when evidence relates to sex crimes that allegedly occurred during the time as charged in the indictment." Rickman, 876 S.W.2d at 828-29. Additionally, "[i]n such cases, the State must elect at the close of its proof-in-chief as to the particular incident for which a conviction is being sought." Id. at 829.

In this case, none of the three acts disputed by the defendant meets the Rickman exception. The episode in which the defendant took the victim to the shed on Dorothy Cinnamon's property does not appear to indicate a "prior bad act," and the victim stated that nothing happened there, sexual or otherwise. As such, that testimony was irrelevant and should have been excluded. Regarding the episode in which the defendant attempted to place a chemical-soaked cloth over the victim's face and the episodes in which the defendant was restrained, the victim testified that no sexual assault occurred during any of those instances, and the defendant did not testify that she was bound, drugged, or otherwise restrained during the elected offenses. Because testimony regarding these episodes did not

meet the requirements for admission under Rickman, such testimony was irrelevant and prejudicial and should have been excluded.

However, while the trial court's admission of this testimony was improper, it does not rise to the level of plain error. Trial counsel did not object to the testimony regarding the disputed acts, either at the time of the victim's testimony or at the time the state elected the offenses at the close of its proof. Rule 404(b) states that a jury-out hearing regarding the admissibility of specific instances of conduct must be held "upon request." Tenn. R. Evid. 404(b)(1). The trial court may hold such a hearing sua sponte, but the defendant has not presented an argument as to why the trial court should have held a sua sponte hearing. The trial court's failure to hold such a hearing, and the court's admission of the disputed testimony, did not adversely affect a substantial right afforded to the defendant.⁶ Additionally, our court has held that "rarely will plain error review extend to an evidentiary issue." State v. Ricky E. Scoville, No. M2006-01684-CCA-R3-CD, 2007 WL 2600540, at *2 (Tenn. Crim. App. Sept. 11, 2007); see also State v. Billy Harris, No. W2003-01911-CCA-R3-CD, 2004 WL 1765532, at *11 (Tenn. Crim. App. Aug. 4, 2004) (failure of trial court to hold Rule 404(b) hearing on prior bad act testimony, even after request by defendant, does not constitute plain error). Thus, the defendant is denied relief on this issue.

Testimony of Other Witnesses Regarding Victim's Previous Sex Abuse Accusations

On cross-examination, the victim admitted that she had initially accused her mother's then-paramour, Clyde Hawn, of the offenses detailed in counts 2 and 3 of the indictment rather than the defendant because she did not believe that the defendant's family would believe her were she to accuse her father of abuse. On redirect, she also testified that Hawn had never abused her and that she was afraid of how her father's family would have reacted had she accused the defendant of abuse. The defendant does not object to this testimony on appeal, but he does contend that the trial court improperly admitted testimony of three subsequent witnesses—DCS worker Lawson, the victim's mother, and Dr. Machen—whose testimony reiterated the victim's earlier accusations that Hawn had molested her, her claims that the defendant, her father, had actually raped her, and the reasons for her varying accusations. We conclude that while the trial court properly admitted this testimony, it erred in failing to issue a limiting instruction to the jury. However, because the lacking jury instruction does not rise to the level of plain error, we deny the defendant relief on this issue.

This court has held that "[o]rdinarily, it is impermissible to corroborate a witness' testimony by evidence of the witness making prior consistent statements, absent an impeaching attack on that testimony." State v. Meeks, 867 S.W.2d 361, 374 (Tenn. Crim. App. 1993) (citing State v. Braggs,

⁶Our court has held that for plain error purposes, a "substantial right of the accused" is a right of "fundamental proportions in the indictment process, a right to the proof of every element of the offense and is constitutional in nature." Adkisson, 899 S.W.2d at 639 (citation omitted).

604 S.W.2d 883, 885 (Tenn. Crim. App. 1980). One of the two circumstances in which prior consistent statements may be admissible is when a witness is impeached through the introduction of a prior inconsistent statement that suggests that the witness' testimony was either fabricated or based upon faulty recollection. Id. Second, a prior consistent statement may be admissible when a witness' prior statement is used out of context to cross-examine the witness. State v. Boyd, 797 S.W.2d 589, 593-94 (Tenn. 1990). However, prior consistent statement testimony, regardless of which exception is used to justify its use, is subject to two conditions. First, before a prior consistent statement may be admissible, "the witness' testimony must have been assailed or attacked to the extent that the witness' testimony needs rehabilitating." State v. Hodge, 989 S.W.2d 717, 725 (Tenn. Crim. App. 1998) (citing State v. Benton, 759 S.W.2d 427, 434 (Tenn. Crim. App. 1998)). Additionally, prior consistent statement testimony cannot be considered for the truth of the matters contained therein, and the trial court must instruct the jury to that effect. See Meeks, 867 S.W.2d at 374; Braggs, 604 S.W.2d at 885.

In this case, the testimony of the victim's mother, the DCS worker, and Dr. Machen concerning the victim's accusations against Hawn, her reasons for making those accusations, and her later accusations that the defendant, and not Hawn, sexually abused her were properly admitted. The testimony of these three individuals was given after the defendant had been attacked on cross-examination, so their testimony was proper to rehabilitate the victim. However, while the trial court instructed the jury that prior inconsistent statements could not be used as substantive evidence, the court did not issue a similar jury instruction for those prior consistent statements intended to rehabilitate the victim. Therefore, while the trial properly admitted the prior consistent statements, it erred by failing to issue a proper limiting instruction.

However, even if admission of this testimony violated a clear and unequivocal rule of law, the trial court's error does not rise to the level of plain error. As was the case with the "prior bad acts" testimony detailed above, the defendant did not raise an objection to these individuals' testimony at trial. The defendant has failed to show that he did not object based on tactical reasons, in that he wanted the jury to hear the accusation against Hawn multiple times. Additionally, based on the medical evidence established by Dr. Machen and the testimony of the victim regarding her prior allegations against Hawn, the defendant has failed to show that a substantial right of his was adversely affected or that consideration of the issue is necessary to do substantial justice. In short, the defendant has not shown that admission of these prior consistent statements, though improper, likely changed the outcome of the trial or undermined the fundamental fairness of the trial. As such, the defendant is not entitled to relief on this issue.

We also note that the defendant asserts that the testimony of the three witnesses violated the defendant's rights under the Confrontation Clause of the United States Constitution. However, we conclude that despite the defendant's assertions to the contrary, the victim was available to testify at trial. If a declarant is available to testify at trial, then no Confrontation Clause problem exists because "[t]he Clause does not bar admission of a statement so long as the declarant is present at trial to

defend or explain it.” Crawford v. Washington, 541 U.S. 36, 59 n.9, 124 S. Ct. 1354, 1369 n.9 (2004). Here, although the three witnesses testified after the victim, the defendant could have recalled the victim, but decided against it. Therefore, the defendant’s claim that the three witnesses’ testimony violated the Confrontation Clause is without merit.

Jury Instructions

In this case, the trial court instructed the jury as follows:

The defendant, Joseph Wayne Higgins, is charged in counts one, two and three for the crime of rape of a child. The defendant pleads not guilty as to this offense.

Any person who commits the offense of rape of a child is guilty of a crime.

For you to find the defendant guilty of this offense, the State must have proven beyond a reasonable doubt the existence of the following essential elements:

AS TO COUNT ONE:

(1) that the defendant had unlawful sexual penetration of the alleged victim by placing his penis in her vagina in his—her mother’s bedroom at the family home on Davenport Road during the victim’s kindergarten year. During the incident, the alleged victim had diarrhea causing the sheets to be soiled;

and

(2) that the alleged victim was less than thirteen (13) years of age;

and

(3) that the defendant acted either intentionally, knowingly, or recklessly.

The trial court similarly instructed the jury on counts two and three. The trial court then explained the culpable mental states of intentionally, knowingly, and recklessly as set forth in Tennessee Code Annotated section 39-11-302, defined sexual penetration, and charged the jury on the lesser-included offenses of aggravated sexual battery and assault. In a jury-out hearing held before the jury instructions were given, the defendant objected to the inclusion of recklessness in the jury instructions. However, the trial court overruled the defendant’s objection.

The defendant contends that the trial court improperly instructed the jury as to the requisite mental state for the offense of rape of a child by including recklessness in the instructions. The defendant specifically contends that because sexual offenses are “nature of the conduct” offenses, reckless conduct could not form the mens rea of the offenses charged in this case, and that including recklessness in the jury instructions impermissibly lowered the state’s burden of proof. We disagree.

In criminal cases, a defendant has the right to a correct and complete charge of the law. State v. Garrison, 40 S.W.3d 426, 432 (Tenn. 2000). The material elements of the charged offense should be described and defined in connection with that offense. State v. Ducker, 27 S.W.3d 889, 899 (Tenn. 2000); State v. Cravens, 764 S.W.2d 754, 756 (Tenn. 1989). The failure to do so deprives the defendant of the constitutional right to a jury trial and subjects the erroneous jury instruction to harmless error analysis. Garrison, 40 S.W.3d at 433-34. A jury instruction, however, must be reviewed in its entirety and read as a whole rather than in isolation. State v. Leach, 148 S.W.3d 42, 58 (Tenn. 2004). “An instruction should be considered prejudicially erroneous only if the jury charge, when read as a whole, fails to fairly submit the legal issues or misleads the jury as to the applicable law.” State v. Faulkner, 154 S.W.3d 48, 58 (Tenn. 2005) (citing State v. Vann, 976 S.W.2d 93, 101 (Tenn. 1998)).

In the present case, the jury instructions, taken as a whole, fairly submitted the legal issues to the jury and did not mislead the jury as to the applicable law. This court has repeatedly held that a trial court may properly instruct the jury on recklessness in a charge for rape of a child. In so holding, this court has affirmed the validity of jury instructions identical to the ones used in the present case. See State v. Thomas D. Stricklin, No. M2005-02911-CCA-R3-CD, 2007 WL 1028535, at **15-18 (Tenn. Crim. App. Apr. 5, 2007); State v. Frederick Leon Tucker, No. M2005-00839-CCA-R3-CD, 2006 WL 547991, at *13 (Tenn. Crim. App. Mar. 7, 2006); State v. Albert R. Neese, No. M2005-00752-CCA-R3-CD, 2006 WL 3831387, at *8 (Tenn. Crim. App. Dec. 15, 2006), perm. app. denied (Tenn. Apr. 23, 2007); State v. William Thomas Branch, No. M2005-01125-CCA-R3-CD, 2006 WL 1932705 (Tenn. Crim. App. Jul. 10, 2006), perm. app. denied (Tenn. Nov. 6, 2006). Furthermore, this court has held that rape of a child is both a “nature of the conduct” and “result of the conduct” offense. See Thomas D. Stricklin, 2007 WL 1028535, at *17; Frederick Leon Tucker, 2006 WL 547991, at *13; William Thomas Branch, 2006 WL 1932705, at *6. Thus, the trial court’s inclusion of “recklessness” in the jury instructions was proper and did not prejudice the defendant.

In advancing his argument, the defendant relies heavily on this court’s opinion in State v. Weltha Womack, No. E2003-02332-CCA-R3-CD, 2005 WL 17428 (Tenn. Crim. App. Jan. 4, 2005), in which we held that because aggravated rape was a “nature of the conduct” offense, including recklessness in the jury instruction prejudiced the defendant. However, this court in Frederick Leon Tucker specifically held that the holding in Weltha Womack does not control in child rape cases. 2006 WL 547991, at *12. Furthermore, as the trial court stated in denying the defendant’s motion for a new trial, the defendant’s sole defense at trial was that he was not the person who committed the offenses against the victim, regardless of whether the offenses were committed knowingly,

intentionally, or recklessly. No evidence was presented which could have led the jury to conclude that the defendant's penetration of the victim was reckless. Therefore, any error the trial court conceivably could have committed by including recklessness in its jury instructions was harmless. See State v. Maddin, 192 S.W.3d 558, 562 (Tenn. Crim. App. 2005). Accordingly, the defendant is not entitled to relief on this issue.

Sentencing

The defendant's final issue is that the trial court's imposed sentence on the first count was excessive and that the trial court erred in imposing consecutive sentences. We conclude that the trial court's imposition of consecutive sentences was proper, but that the trial court erred in enhancing the defendant's sentence on count one of the indictment.

Length of Sentence/Enhancement Factors

At the defendant's sentencing hearing, the trial court found the following enhancement factors applicable to the defendant's conviction on count one of the indictment, the rape which occurred when the victim was between four and five years old:

- (2) The defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range;
- (5) A victim of the offense was particularly vulnerable because of age or physical or mental disability ;
- (6) The defendant treated, or allowed a victim to be treated, with exceptional cruelty during the commission of the offense; and
- (16) The defendant abused a position of public or private trust, or used a special skill in a manner that significantly facilitated the commission or the fulfillment of the offense.

Tenn. Code Ann. § 40-35-114(2), (5)-(6), (16) (2003). Based on these enhancement factors and an absence of mitigating factors, the court sentenced the defendant to the maximum sentence of twenty-five years in prison.

An appellate court's review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d) (2003).⁷ As the Sentencing Commission Comments to this section note, on appeal the burden is on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, the court may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In this respect, for the purpose of meaningful appellate review,

[T]he trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. Tenn. Code Ann. § 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

Under the law as it existed before the 2005 amendment, unless enhancement factors were present, the presumptive sentence to be imposed was the midpoint in the range for a Class A felony. Tenn. Code Ann. § 40-35-210(c) (2003). Tennessee's pre-2005 sentencing act provided that, procedurally, the trial court was to increase the sentence within the range based on the existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. Id. at (d), (e). The weight to be afforded an existing factor was left to the trial court's discretion so long as it complied with the purposes and principles of the 1989 Sentencing Act and the court's findings were adequately supported by the record. Id. § 40-35-210 (2003), Sentencing Commission Comments; State v. Moss, 727 S.W.2d 229, 237 (Tenn. 1986); see Ashby, 823 S.W.2d at 169.

While the court can weigh the enhancement factors as it chooses, the court may only apply the factors if they are "appropriate for the offense" and "not themselves essential elements of the

⁷ We note that on June 7, 2005, the General Assembly amended Tennessee Code Annotated sections 40-35-102(6), -114, -210, -401. See 2005 Tenn. Pub. Acts ch. 353, §§ 1, 5, 6, 8. However, the amended code sections are inapplicable to the defendant's appeal because the defendant's offense, trial, and sentencing hearing all occurred before the new law was enacted.

offense.” Tenn. Code Ann. § 40-35-114 (2003). Our supreme court has stated that “[t]he purpose of the limitations is to avoid enhancing the length of sentences based on factors the Legislature took into consideration when establishing the range of punishment for the offense.” State v. Poole, 945 S.W.2d 93, 98 (Tenn. 1997).

In conducting its de novo review, the appellate court must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); see Ashby, 823 S.W.2d at 168; Moss, 727 S.W.2d at 236-37.

Until recently, this court could conclude that the defendant’s sentence on count one of the indictment was proper. In April 2005, the Tennessee Supreme Court examined the pre-2005 Sentencing Reform Act and held that the act did not violate Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). See State v. Gomez, 163 S.W.3d 632, 661 (Tenn. 2005). However, on February 20, 2007, the day the defendant filed his brief in this case, the United States Supreme Court vacated our supreme court’s ruling in Gomez and remanded the case to the state supreme court⁸ for additional consideration in light of the Court’s opinion in Cunningham v. California, 127 S. Ct. 856 (2007). As such, we no longer feel constrained to follow Gomez.

In the absence of Gomez, this court examines the defendant’s sentence in light of the Supreme Court’s opinion in Blakely, which the Court recently reaffirmed in its Cunningham opinion. In Blakely, the court extended the rule it announced in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), and held that the Sixth Amendment guarantee to a jury trial encompassed the right to have the jury determine all essential facts necessary for the imposition of the sentence:

Our precedents make clear, however, that the “statutory maximum” for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In other words, the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts “which the law makes essential to the punishment,” and the judge exceeds his proper authority.

⁸127 S. Ct. 1209 (2007).

Blakely, 542 U.S. at 303 (emphasis in original, internal citations omitted); see also Cunningham, 127 S. Ct. at 860; Apprendi, 530 U.S. at 490.

At the sentencing hearing, the defendant admitted to convictions resulting from three previous episodes of criminal behavior: a 1997 conviction for possession of drug paraphernalia, a 1996 conviction for driving on a revoked license, and three convictions for writing worthless checks in 1996. Because the defendant admitted to these offenses, and because the Supreme Court exempted proof of a defendant's prior criminal convictions from the requirement that the jury find proof of enhancement factors beyond a reasonable doubt, see Cunningham, 127 S. Ct. at 868, the trial court properly applied enhancement factor (2) to the defendant's sentence. The other three enhancement factors, however, are another matter. While the state argues that the trial court properly concluded that the evidence produced at trial showed that the victim was particularly vulnerable due to her young age, that the victim was treated with exceptional cruelty during the attack, and that defendant abused a position of private trust in raping his daughter, the record shows that any evidence that would be necessary to justify application of these enhancement factors was not found by the jury beyond a reasonable doubt. Therefore, we conclude that the trial court violated the defendant's Sixth Amendment rights in applying enhancement factors (5), (6), and (16) to the defendant's sentence.

Although enhancement factor (2) still applies to the defendant's sentence, the record suggests that the trial court placed little weight on this enhancement factor. As such, this enhancement factor alone cannot justify imposing the maximum sentence of twenty-five years on count one of the indictment. Therefore, we conclude that the trial court improperly sentenced the defendant to the maximum sentence of twenty-five years on count one of the indictment. Accordingly, we reduce the defendant's sentence on that count to twenty years, the presumptive sentence under the former sentencing act for a Class A felony committed by a Range I, standard offender. Tenn. Code Ann. §§ 40-35-112(a)(1) and -210(c) (2003).

Consecutive Sentences

Consecutive sentencing is guided by Tennessee Code Annotated section 40-35-115(b), which states in pertinent part that the trial court may order sentences to run consecutively if it finds by a preponderance of the evidence that

[t]he defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims[.]

Tenn. Code Ann. § 40-35-115(5) (2003). The trial court is required to “specifically recite the reasons” behind imposition of a consecutive sentence. See Tenn. R. Crim. P. 32(c)(1); see, e.g., State v. Palmer, 10 S.W.3d 638, 647-48 (Tenn. Crim. App. 1999) (noting the requirements of Rule 32(c)(1) for purposes of consecutive sentencing).

In imposing consecutive sentences, the trial court stated:

[T]here have been aggravating circumstances. And there’s a long time span of undetected sexual activity. And that these scopes have an extent in—have a long scope, and that they result in residual, physical and mental damage to the victim. To a certain extent those things are there.

There is certainly a relationship which is a part of all that we’ve dealt with. This went on for a number of years. And I know that everybody here being [the victim’s] relatives understand that she’s had a terrible life, whether through this or the other things that have happened to her and that she’s experienced. She’s suffered mightily by this.

The trial court’s statement on the record of its reasons for imposing consecutive sentences met the requirements established in Tennessee Code Annotated section 40-35-115(b) and Tennessee Rule of Criminal Procedure 32(c)(1).

Although not explicitly raised by the defendant, another issue concerning consecutive sentences is whether the Sixth Amendment concerns addressed by the Supreme Court in Apprendi, Blakley, and Cunningham are implicated in Tennessee’s consecutive sentencing act. No opinion filed by the United States Supreme Court or the Tennessee Supreme Court specifically addresses the judicial authority to determine the manner of service of multiple convictions. However, there is no language in Apprendi, Blakley, or Cunningham that indicates that a defendant’s Sixth and Fourteenth Amendment protections extend beyond each individual prosecution in the context of criminal sentencing. The Apprendi Court noted:

We do not suggest that trial practices cannot change in the course of centuries and still remain true to the principles that emerged from the Framers’ fears “that the jury right could be lost not only by gross denial, but by erosion.” But practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts

necessary to constitute a statutory offense, and proving those facts beyond a reasonable doubt.

Apprendi, 530 U.S. at 483-84 (emphasis added, internal citations omitted). In our view, a trial court's decision whether to impose consecutive sentences does not involve the facts "necessary to constitute a statutory offense" and therefore does not deny the defendant the fundamental rights he is afforded under the Sixth and Fourteenth Amendments. The manner of service of the sentence imposed when a trial court decides whether to impose consecutive sentences—a decision it may make only after the jury has found the defendant guilty of multiple offenses beyond a reasonable doubt—does not usurp the jury's factfinding powers or offend the defendant's due process rights. Therefore, we decline to hold that the right to a jury trial guaranteed to the defendant is violated by Tennessee Code Annotated section 40-35-313. Our conclusion today is consistent with previous opinions in which we concluded that the sentencing principles announced by the Supreme Court in Blakely and related cases do not impact consecutive sentencing. See, e.g., State v. Anthony Allen, No. W2006-01080-CCA-R3-CD, 2007 WL 1836175, at **2-3 (Tenn. Crim. App. June 25, 2007), app. filed (Tenn. Aug. 24, 2007); State v. William Shane Bright, No. E2006-01906-CCA-R3-CD, 2007 WL 1259177, at *2 n.1 (Tenn. Crim. App. Apr. 30, 2007); State v. Earice Roberts, No. W2003-02668-CCA-R3-CD, 2004 WL 2715316, at *15 (Tenn. Crim. App. Nov. 23, 2004), app. denied (Tenn. Mar. 21, 2005), State v. Lawrence Warren Pierce, No. M2003-01924-CCA-R3-CD, 2004 WL 2533794, at *16 (Tenn. Crim. App. Nov. 9, 2004), app. denied (Tenn. Feb. 28, 2005).

Because the trial court followed proper procedures and did not violate the defendant's Sixth and Fourteenth Amendment rights in ordering him to serve consecutive sentences, he is denied relief on this issue.

CONCLUSION

Upon consideration of the foregoing and the record as a whole, we affirm the defendant's guilty verdicts and the trial court's imposition of consecutive sentencing. However, we modify the defendant's sentence on count one of the indictment from twenty-five years to twenty years, resulting in a revised effective sentence of forty years.

D. KELLY THOMAS, JR., JUDGE